

**United States Bankruptcy Court  
Central District of California  
Los Angeles  
Judge Ernest Robles, Presiding  
Courtroom 1568 Calendar**

**Wednesday, April 1, 2020**

**Hearing Room 1568**

10:00 AM

**2:19-10549 Bahram Zendedel**

**Chapter 7**

Adv#: 2:19-01110 Nguyen dba Sam Bullion & Coin v. Zendedel

**#1.00** Hearing re [26] Examination re Enforcement of Judgment of Judgment Debtor  
BAHRAM ZENDEDEL aka ROBERT ZENDEDEL

fr. 12-3-19; 2-19-20

Docket 0

**\*\*\* VACATED \*\*\* REASON: CONTINUED 6-17-20 AT 10:00 A.M.**

**Tentative Ruling:**

2/18/2020

Appearances required.

<b>Party Information</b>
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**Debtor(s):**

Bahram Zendedel

Represented By  
Khachik Akhkashian

**Defendant(s):**

Bahram Zendedel

Pro Se

**Plaintiff(s):**

Sam Thuy Nguyen dba Sam Bullion

Represented By  
Nico N Tabibi

**Trustee(s):**

Peter J Mastan (TR)

Represented By  
Chad V Haes

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**2:19-24831 Carmen Johana Cardona Mejia**

**Chapter 7**

**#2.00** Hearing re [10] *Motion for Order Authorizing Debtor Examination and Production of Documents Under Bankruptcy Rule 2004*

Docket 0

**\*\*\* VACATED \*\*\* REASON: CONTINUED 4-15-2020 AT 11:00 A.M.**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Carmen Johana Cardona Mejia

Represented By  
Juan Castillo-Onofre

**Trustee(s):**

Edward M Wolkowitz (TR)

Pro Se

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**2:19-24833 Marvin Ruiz Davila**

**Chapter 7**

**#3.00** Hearing re [11] *Motion for Order Authorizing Debtor Examination and Production of Documents Under Bankruptcy Rule 2004*

Docket 0

**\*\*\* VACATED \*\*\* REASON: COTNINUED 4-15-2020 AT 11:00 A.M.**

**Tentative Ruling:**

- NONE LISTED -

<b>Party Information</b>
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**Debtor(s):**

Marvin Ruiz Davila

Represented By  
Juan Castillo-Onofre

**Trustee(s):**

Edward M Wolkowitz (TR)

Pro Se

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**2:20-11781 Marquis Campbell**

**Chapter 7**

**#4.00** Status HearingRE: [1] Chapter 7 Involuntary Petition Against an Individual. Benjamin Farquhar, Elisa Ritter . (Tom, Bock) Additional attachment(s) added on 2/19/2020 (Tom, Bock).

Docket 1

**Tentative Ruling:**

3/31/2020

**Note: Telephonic Appearances Only. The Courtroom will be unavailable for in-court appearances. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, ext. 188 no later than one hour before the hearing. The cost for persons representing themselves has been waived.**

The involuntary petition is DISMISSED for the reasons set forth below.

**Pleadings Filed and Reviewed:**

- 1) Involuntary Petition Against a Non-Individual [Doc. No. 1]
- 2) Summons and Notice of Status Conference in an Involuntary Bankruptcy Case [Doc. No. 3]

The Petitioning Creditors have failed to file a proof of service establishing that the Summons, Notice of Status Conference, and Involuntary Petition were served upon the Alleged Debtor. The Summons issued to the Petitioning Creditors clearly informs the Petitioning Creditors of the obligation to serve the Summons, Notice of Status Conference, and Involuntary Petition upon the Alleged Debtor. The Summons further advises the Petitioning Creditors that failure to properly effectuate service may result in dismissal of the involuntary petition.

Local Bankruptcy Rule 1010-1 provides in relevant part: "The court may dismiss an involuntary petition without further notice and hearing if the petitioner fails to ... (c) serve the summons and petition within the time allowed by FRBP 7004; (d) file a proof of service of the summons and petition with the court; or (e) appear at the status conference set by the court."

Based upon the foregoing, the involuntary petition is DISMISSED.

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**CONT... Marquis Campbell**

**Chapter 7**

Notwithstanding the dismissal, the Court will retain jurisdiction to adjudicate the motions for stay relief filed by Peter H. and Amalia P. Lucas [Doc. No. 6] and Broker Solutions, Inc. dba New American Funding [Doc. No. 8].

The Court will prepare and enter an appropriate order.

<b>Party Information</b>
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**Debtor(s):**

Marquis Campbell

Pro Se

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**2:18-20151 Verity Health System of California, Inc.**

**Chapter 11**

**#5.00** HearingRE: [4223] Motion and Notice of Debtors' Motion for Entry of an Order Authorizing (1) Return of Funds Held in a 26 U.S.C. § 457(B) "Rabbi" Trust to the Debtors' Estates, (2) Transfer of Postpetition Amounts Made by Two Employees (Eleanor Ramirez and Derek Drake) that were Improvidently Made; and Declaration Of Steven C. Sharrer in Support

Docket 4223

**Tentative Ruling:**

3/31/2020

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For the reasons set forth below, the Motion is **GRANTED** in its entirety.

**Pleadings Filed and Reviewed:**

- 1) Debtors' Notice of Motion and Motion for Entry of an Order Authorizing (1) Return of Funds Held in a 26 U.S.C. § 457(b) "Rabbi" Trust to the Debtors' Estates and (2) Transfer of Postpetition Amounts Made by Two Employees (Eleanor Ramirez and Derek Drake) That Were Improvidently Made [Doc. No. 4223] (the "Motion")
  - a) Declaration of Service by Kurtzman Carson Consultants, LLC Regarding Docket Numbers 4220, 4221, 4223 and 4226 [Doc. No. 4291]

**I. Facts and Summary of Pleadings**

Debtors move for entry of an order authorizing the (1) turnover of funds in the approximate amount of \$80,000 (the "Funds") currently held in a 26 U.S.C. § 457(b) "rabbi" trust (the "Trust") administered by Transamerica Retirement Solutions, LLC on behalf of the passive, directed trustee State Street Bank and Trust Company (together, the "Trustee") to the Debtors' estates and (2) upon the Debtors' receipt of the Funds, authority for the Debtors to return (a) \$32,267.00 to Eleanor Ramirez, the

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interim Chief Executive Officer at St. Francis Medical Center (“St. Francis”) and (b) \$11,500.00 to Derek Drake, the Chief Nursing Officer at St. Francis. No opposition to the Motion is on file.

**Summary of the Motion**

The Debtors make the following arguments and representations in support of the Motion:

On August 31, 2018 (the “Petition Date”), Verity Health System of California (“VHS”) and certain of its subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors’ cases are being jointly administered.

Prior to the Petition Date, the Debtors, in the ordinary course of business, established the Trust and contributed funds to the Trustee to hold in the Trust as voluntary deferred compensation for employees. Ramirez and Drake (the “Employees”) voluntarily elected to make contributions to the Trust.

Because the Trust is a rabbi trust established pursuant to 26 U.S.C. § 671, beneficiaries are not taxed on their portion of the Trust corpus or proceeds until the assets are actually distributed to them. However, funds contributed into a rabbi trust are generally subject to the claims of the employer’s general creditors in the event the employer becomes insolvent. Thus, if an employer files for bankruptcy, the rabbi trust corpus becomes property of the grantor’s bankruptcy estate.

Prior to the Petition Date, the Debtors transferred funds to the Trust representing the Employees’ voluntary deferred compensation every pay period. The Employees had the right to elect to forego contributions to the Trust before any applicable payday, and to instead receive such amounts as taxable compensation. Because the Employees were preoccupied with increased obligations arising in connection with the Debtors’ bankruptcy filing, they did not affirmatively elect to stop the contributions prior to the Petition Date. As a result, the Debtors continued to make contributions to the Trust in consideration for the Employees’ postpetition services until May 31, 2019, for Ramirez, and until July 18, 2019, for Drake, at which time the Employees requested the contributions be terminated.

The Funds in the Trust total approximately \$80,000. Of that amount, approximately \$32,267 consists of post-petition payments for Ramirez and approximately \$11,500 consists of post-petition payments for Drake (the “Post-Petition Portion”).

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The Debtors have determined in their business judgment that the Employees should receive their Post-Petition Portion of the Funds because the Employee's post-petition efforts were integral to preserving the Debtors' assets, the Funds were contributed to the Trust as deferred compensation instead of real-time compensation inadvertently, and the Debtors will suffer no adverse impact from conveying the Post-Petition Portions to the Employees, but failure to convey the Post-Petition Portions will reduce morale.

The Debtors have discussed the relief sought in the Motion with the Trustee, who has requested an order from the Court prior to distribution of the Funds.

## **II. Findings and Conclusions**

Section 542 provides: "[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell or lease under section 363 of this title ..., shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." The "property" referred to in §542 "is generally understood to mean 'property of the estate,' as defined in section 541." *Collier on Bankruptcy* ¶ 542.02[2] (16th rev'd ed.).

Here, the Funds are property of the estates that are in the possession of the Trustee. Although the Funds were contributed for the benefit of the Employees, the Funds are property of the estate because the trust corpus of a rabbi trust remains property of the employer until the assets are distributed to employees. *See generally* 26 U.S.C. § 671 et seq. Pursuant to § 542, the Trustee is required to turnover the Funds to the Debtors.

Upon return of the Funds to the Debtors, the Debtors are authorized to distribute the Funds to the Employees. The Employees are entitled to the Funds as compensation for post-petition services performed for the benefit of the estates. Pursuant to § 503(b)(1)(A)(i), the "actual, necessary costs and expenses of preserving the estate, including ... wages, salaries, and commissions for services rendered after the commencement of the case" qualify as an administrative expense. The Post-Petition Portion of the Funds qualify as "salaries" within the meaning of § 503(b)(1)(A)(i) and are payable to the Employees as an administrative expense.

Based upon the foregoing, the Motion is **GRANTED** in its entirety. Within seven days of the hearing, the Debtors shall submit an order incorporating this tentative ruling by reference.



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No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Carlos Nevarez or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

<b>Party Information</b>
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**Debtor(s):**

Verity Health System of California,

Represented By

Samuel R Maizel

John A Moe II

Tania M Moyron

Claude D Montgomery

Sam J Alberts

Shirley Cho

Patrick Maxcy

Steven J Kahn

Nicholas A Koffroth

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**2:18-20151 Verity Health System of California, Inc.**

**Chapter 11**

- #5.10** Hearing re [4365] Debtors' Emergency Motion For The Entry Of: (I) An Order (1) Approving Form Of Asset Purchase Agreement; (2) Approving Auction Sale Format And Bidding Procedures; (3) Approving Stalking Horse Bidder And Bid Protections; (4) Approving Form Of Notice To Be Provided To Interested Parties; (5) Scheduling A Court Hearing To Consider Approval Of The Sale To The Highest And Best Bidder; And (6) Approving Procedures Related To The Assumption Of Certain Executory Contracts And Unexpired Leases; And (Ii) An Order Authorizing The Sale Of Property Free And Clear Of All Claims, Liens And Encumbrances

Docket 0

**Tentative Ruling:**

3/31/2020

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Subject to any opposition that may be presented at the hearing, the Court is prepared to **GRANT** the Bidding Procedures Motion.

**Pleadings Filed and Reviewed:**

- 1) Debtors' Emergency Motion for the Entry of: (I) An Order (1) Approving Form of Asset Purchase Agreement; (2) Approving Auction Sale Format and Bidding Procedures; (3) Approving Stalking Horse Bidder and Bid Protections; (4) Approving Form of Notice to be Provided to Interested Parties; (5) Scheduling a Court Hearing to Consider Approval of the Sale to the Highest and Best Bidder; and (6) Approving Procedures Related to the Assumption of Certain Executory Contracts and Unexpired Leases; and (II) An Order Authorizing the Sale of Property Free and Clear of All Claims, Liens and Encumbrances [Doc. No. 4365] (the "Bidding Procedures Motion")
- 2) Order Setting Hearing on Debtors' Emergency Motion to Approve Bidding Procedures for the Auction of St. Vincent Medical Center [Doc. No. 4367]
  - a) Declaration of Service by Kurtzman Carson Consultants, LLC Regarding Docket Numbers 4365 and 4367 [Doc. No. 4369]

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**Chapter 11**

**I. Facts and Summary of Pleadings**

On August 31, 2018 (the “Petition Date”), Verity Health System of California (“VHS”) and certain of its subsidiaries (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors’ cases are being jointly administered.

Debtors seek approval of procedures governing the auction of St. Vincent Medical Center (“SVMC”) and related assets (collectively, the “Purchased Assets”). *See* Doc. No. 4365 (the “Bidding Procedures Motion”). Under the proposed bidding procedures (the “Bidding Procedures”), the Chan Soon-Shiong Family Foundation, which has submitted a bid of \$135 million for the Purchased Assets, shall be designated as the stalking horse bidder (the “Stalking Horse Bidder” or the “Foundation”). The Foundation is a non-profit private foundation whose mission is to support innovations in healthcare with a focus on the poor and the underserved.

The Court has set an emergency hearing on the Bidding Procedures Motion based upon the Debtors’ representation that uncertainty in the capital markets resulting from the Covid-19 pandemic warrants review of the proposed transaction as rapidly as possible.

**A. Bidding Procedures Pertaining to the Auction**

The material terms of the Bidding Procedures, as they pertain to the Auction, may be summarized as follows [Note 1]:

- 1) The Stalking Horse Bid is \$135 million. In exchange for serving as the Stalking Horse Bidder, the Foundation is entitled to a break-up fee of \$3.75 million (2.78% of the Stalking Horse Bid) (the “Break-Up Fee”) plus reasonable out-of-pocket and documented fees and expenses, not to exceed \$1 million (up to 0.74% of the Stalking Horse Bid) (the “Expense Reimbursement”). The Foundation has made a deposit of \$8.1 million (the “Deposit”).
- 2) Only bidders submitting a Qualified Bid [Note 2] are entitled to participate in the Auction. In order to constitute a Qualified Bid, a Bid must satisfy the following requirements (the “Bid Requirements”):
  - a) Be accompanied by a deposit in the amount of \$8.1 million (an amount equal to the Deposit submitted by the Stalking Horse Bidder). Bidding Procedures at ¶ 9(g).
  - b) Provide sufficient and adequate information to demonstrate to the

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satisfaction of the Debtors, in consultation with the Consultation Parties, that the bidder has the financial wherewithal to consummate the Sale. *Id.* at ¶ 9(h).

- c) Include a written statement that the bidder consents to the jurisdiction of the Bankruptcy Court (including waiving any right to a jury trial) in connection with any disputes related to the Bidding Procedures, the Auction, the Sale Hearing, the Sale Order, and/or the closing of the Sale. *Id.* at ¶ 9(i).
  - d) State that the bidder is willing to serve as a Back-Up Bidder and that its Qualified Bid shall constitute the Back-Up Bid if the Debtors determine that it qualifies as the Back-Up Bid. *Id.* at ¶ 9(m). The Back-Up Bidder must keep the Back-Up Bid open and irrevocable until the earlier of (i) 30 days after entry of the Sale Order or (ii) the date of the closing of the Sale to the Winning Bidder. *Id.* at ¶ 14(a).
- 3) Debtors shall conduct the auction on April 6, 2020, virtually by such means as they deem appropriate. *Id.* at ¶ 13. Bidding shall be in increments of at least \$2 million. *Id.* at ¶ 13(d).

**B. Bidding Procedures Pertaining to the Assumption and Assignment of Unexpired Leases and Executory Contracts**

The material terms of the Bidding Procedures, as they pertain to the assumption and assignment of executory contracts and unexpired leases, may be summarized as follows:

- 1) In connection with the Sale, the Debtors will seek to assume and assign certain executory contracts and unexpired leases (collectively, the "Assumed Executory Contracts") pursuant to § 365. (For simplicity, as used hereafter, the term "executory contract" means an executory contract and/or an unexpired lease, as the context requires.)
- 2) The Assumed Executory Contracts will be those agreements that the Debtors believe may be assumed and assigned as part of the orderly transfer of the Purchased Assets; provided, however, that the Winning Bidder may choose to exclude (or to add) agreements to the list of the Assumed Executory Contracts.
- 3) The Debtors will serve a Cure Notice upon the counterparty to each Assume Executory Contract. The Cure Notice will identify the amount, if any, that the Debtors believe is owed to each counterparty to cure any defaults that exist

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under such contract (the "Cure Amounts"). The Cure Notice will specify the deadlines for counterparties to (a) object to the sufficiency of the Cure Amount and/or (b) object to the assumption and assignment of the Assumed Executory Contracts.

**C. Materials Terms of the APA**

The materials terms of the Asset Purchase Agreement (the "APA") are as follows:

- 1) The Purchaser is not required to close the transaction unless (a) the Bankruptcy Court has entered the Sale Order in a form reasonably acceptable to the Purchaser and (b) the Sale Order has become final and non-appealable. APA at § 8.4(a).
- 2) The transaction may be terminated by either the Purchaser or the Sellers if the sale has not closed on or before June 1, 2020. *Id.* at § 9.1(h).
- 3) The Purchased Assets are being sold "as is, where is" with no warranties of merchantability or fitness for a particular purpose. *Id.* at § 1.12.
- 4) The transaction shall close within five business days after all of the following conditions have been satisfied:
  - a) The Sale Order has become final and non-appealable. *Id.* at §§ 1.3 and 8.4(a).
  - b) The Bidding Procedures Order has become final and nonappealable. *Id.* at §§ 1.3 and 8.4(b).
  - c) The deadline shall have passed for counterparties to Assigned Contracts to object to the assumption and/or assignment of such Assigned Contracts. *Id.* at §§ 1.3 and 8.4(c).

**II. Findings and Conclusions**

**A. Bids Submitted By Non-Profit Entities Will Be Favored Over Bids Submitted by For-Profit Entities**

The Court's obligation is to approve bidding procedures that are most likely to result in the estates receiving "optimal value" for the Purchased Assets. *See Simantob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 288–89 (B.A.P. 9th Cir. 2005). Here, "optimal value" means a transaction that closes quickly, even if a transaction that takes longer to close yields a higher nominal purchase price. The reason is that the Debtors' cash flow situation is dire and the estates are in need of an immediate cash infusion. In addition, the significant monthly costs required to maintain

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the Purchased Assets means that a transaction that closes quickly may ultimately be financially superior to a transaction at a higher nominal price that takes longer to close.

A sale to the Stalking Horse Bidder is not subject to the review of the California Attorney General (the “Attorney General”) under Cal. Corp. Code §§ 5914 *et seq.*, because the Stalking Horse Bidder is not a for-profit corporation. *See In re Verity Health Sys. of California, Inc.*, 598 B.R. 283, 294 (Bankr. C.D. Cal. 2018) (holding that under California law, the Attorney General’s authority to regulate the sale of a non-profit entity’s assets applies only if the assets are sold to a for-profit entity). A sale to a for-profit entity would be subject to the Attorney General’s review, which can take up to 135 days. *See* Cal. Corp. Code § 5921 (providing the Attorney General 90 days to review the sale of a non-profit entities’ assets, subject to one additional 45-day extension). A sale to a non-profit entity can close more rapidly than a sale to a for-profit entity, and therefore provides greater value to the estates.

If an Auction occurs and the Court is required to determine which bid provides optimal value to the estates, bids submitted by non-profit entities will be favored. The only way that a for-profit entity could close the sale by the June 1, 2020 deadline set forth in the APA would be if the Attorney General conducted an expedited review process. Even if the timing was not an issue, bids submitted by non-profit entities are preferred because they eliminate a key source of uncertainty associated with closing the sale transaction—the nature of the conditions that the Attorney General may seek to impose.

**B. The Stalking Horse Bid Protections Are Approved**

Debtors seek approval of Stalking Horse Bid Protections (the “Bid Protections”) consisting of a Break-up Fee of \$3.75 million (2.78% of the Stalking Horse Bid) and reimbursement of the Stalking Horse Bidder’s reasonable out-of-pocket and documented fees and expenses, not to exceed \$1 million (the “Expense Reimbursement”).

The purpose of Bid Protections is “(1) to attract or retain a potentially successful bid, (2) to establish a bid standard or minimum for other bidders to follow, or (3) to attract additional bidders.” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 662 (S.D.N.Y. 1992).

The Bid Protections proposed here accomplish these purposes and are approved. The Bid Protections are reasonable relative to the risks, efforts, and expenses of the Stalking Horse Bidder. Uncertainty stemming from the Covid-19 pandemic has resulted in a significant increase in funding costs for even financially strong borrowers.

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Against this backdrop, a Break-Up Fee of 2.78% and an Expense Reimbursement of up to 0.74% is not excessive.

**C. The Bidding Procedures Are Approved Subject to Modifications to ¶¶ 9(h), 15(a), and 15(d)**

The Court finds that the Bidding Procedures are likely to yield optimal value for the estates. The Bidding Procedures are approved, subject to the following modifications to paragraphs 9(h), 15(a), and 15(d) (modifications, deletions, and additional language are **in bold**):

- ¶ 9(h): In order to constitute a “Qualified Bid,” a Bid must satisfy the following requirements (the “Bid Requirements”): ... (h) provide sufficient and adequate information to demonstrate to the satisfaction of the Debtors, in consultation with the Consultation Parties, that such Potential Bidder has the financial wherewithal and ability to consummate the Sale, **and if requested by the court, to have a representative of such Potential Bidder testify as to such financial wherewithal and ability to consummate the Sale;**
- ¶ 15(a): The sale hearing is presently scheduled to take place on April 8 10, 2020 at 10:00 a.m. (Pacific Time), or as soon thereafter as counsel may be heard, before the Honorable Ernest M. Robles, ~~Courtroom 1568, 255 E. Temple St., Los Angeles, California, or if permitted by the Court~~, by telephonic hearing (the “Sale Hearing”). **In view of the Covid-19 pandemic, the Courtroom will be unavailable for in-court appearances. Parties wishing to make a telephonic appearance should contact CourtCall at 888-882-6878, ext. 188 no later than one hour before the hearing.**
- ¶ 15(d): The Debtors will present the results of the Auction to the Bankruptcy Court at the Sale Hearing, at which certain findings will be sought from the Bankruptcy Court regarding the Auction, including, among other things, that ... (v) each of the Winning Bidder and Back-Up Bidder are deemed to be purchasers of the Purchased Assets in good faith as set forth in § 363(m). **Representatives of the Winning Bidder and Back-Up Bidder shall appear at the Sale Hearing to offer testimony in support of the requested good-faith finding if requested by the court.**

**D. Auction Deadlines**

With respect to the Auction, the following timeline shall apply (all times are



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prevailing local time) [Note 3]:

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- 1) April 1, 2020: Deadline for Debtors to serve the approved Bidding Procedures and Auction and Sale Notice
- 2) April 3, 2020, at 5:00 p.m.: Bid Deadline for Qualified Bids
- 3) April 6, 2020, at 10:00 a.m.: Auction (to be conducted virtually by the Debtors)
- 4) April 7, 2020, at 5:00 p.m.: Deadline to file any objections to the Sale
- 5) April 9, 2020: Deadline for Debtors to file and serve the Cure Notice
- 6) April 10, 2020, at 10:00 a.m.: Sale Hearing
- 7) April 16, 2020, at 5:00 p.m.: Deadline for counterparties to Assigned Contracts to file and serve Assumption Objections
- 8) April 23, 2020: Deadline for Debtors to file any replies to an Assumption Objection
- 9) April 29, 2020, at 10:00 a.m.: Assumption Objection Hearing

### **III. Conclusion**

Subject to any opposition that may be presented at the hearing, the Court is prepared to **GRANT** the Bidding Procedures Motion.

#### **Note 1**

This summary contains only the most significant provisions of the Bidding Procedures. Parties should consult the Bidding Procedures (attached to the Bidding Procedures Motion as Ex. B) for a complete list of (a) the requirements that bidders must satisfy to participate in the Auction and (b) the rules governing the Auction.

#### **Note 2**

Capitalized terms not defined herein have the meaning set forth in the Bidding Procedures Motion, the Bidding Procedures, and/or the APA, as applicable.

#### **Note 3**

The Court has adopted the timeline proposed by the Debtors, except that the Sale Hearing shall take place on April 10, 2020, at 10:00 a.m. (not on April 8, 2020, at 10:00 a.m.), and the Assumption Objection Hearing shall take place on April 29, 2020, at 10:00 a.m. (not on April 30, 2020, at 10:00 a.m.).

<b>Party Information</b>
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Courtroom 1568 Calendar**

**Wednesday, April 1, 2020**

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10:00 AM

**CONT... Verity Health System of California, Inc.**

**Chapter 11**

**Debtor(s):**

Verity Health System of California,

Represented By

Samuel R Maizel

John A Moe II

Tania M Moyron

Claude D Montgomery

Sam J Alberts

Shirley Cho

Patrick Maxcy

Steven J Kahn

Nicholas A Koffroth

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Central District of California  
Los Angeles  
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**2:20-10264 450 S. Western, LLC, a California limited liability**

**Chapter 11**

**#6.00** HearingRE: [86] Motion to Use Cash Collateral -- Debtor's Second Motion For Order Authorizing Use Of Cash Collateral From April 5, 2020 Through And Including July 4, 2020; Memorandum Of Points And Authorities In Support Thereof, With Proof Of Service

Docket 86

**Tentative Ruling:**

3/31/2020

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For the reasons set forth below, the Debtor is authorized to use cash collateral in accordance with the Budget through and including July 4, 2020. A hearing on the use of cash collateral subsequent to July 4, 2020, shall take place on **July 1, 2020, at 10:00 a.m.** The hearing will go off calendar if the Debtor has sold its assets prior to the hearing date.

**Pleadings Filed and Reviewed:**

- 1) Debtor's Second Motion for Order Authorizing Use of Cash Collateral from April 5, 2020 Through and Including July 4, 2020 [Doc. No. 86] (the "Motion")
  - a) Notice of [Motion] [Doc. No. 87]
  - b) Notice of Filing of Updated Cash Collateral Budget from April 5, 2020 Through and Including July 4, 2020 [Doc. No. 95]
- 2) No opposition to the Motion is on file

**I. Facts and Summary of Pleadings**

On January 10, 2020 (the "Petition Date"), 450 S. Western, LLC (the "Debtor") filed a voluntary Chapter 11 petition. On January 16, 2020, the Court entered an interim order authorizing the Debtor to use cash collateral through and including February 20, 2020. *See* Doc. No. 31. On March 10, 2020, the Court authorized the

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Debtor to use cash collateral through and including April 4, 2020. *See* Doc. No. 83. The Court set this hearing to determine whether the Debtors should be authorized to use cash collateral subsequent to April 4, 2020. The Debtor seeks authorization to use cash collateral through and including July 4, 2020. No opposition to the Motion is on file.

The Debtor owns and operates a three-story, 80,316 square foot shopping center—commonly known as California Marketplace—located at the intersection of South Western Avenue and 5th Street. The shopping center serves the Los Angeles Korean community and contains 28 stores. As of the Petition Date, the shopping center had a 98% occupancy rate.

The Debtor sought bankruptcy protection primarily as the result of litigation with Admire Capital Lending, LLC (“Admire”) and Belmont Two Investment Holdings, LLC (“Belmont”). On September 10, 2015, the Debtor entered into an unsecured promissory note with Belmont and Admire, in the principal amount of \$9.75 million (the “Note”). In litigation before the Los Angeles Superior Court, Belmont and Admire assert a right to convert the Note to equity (the “Conversion Option”). The Debtor disputes the Conversion Option.

As of the Petition Date, the Debtor has secured debt in the estimated amount of approximately \$43 million, as follows:

- 1) G450 LLC—\$29,932,758.97
- 2) Pontis Capital, LLC—\$4,654,666.66
- 3) Five West Capital, LP—\$5,818,333.44
- 4) Evergreen Capital Asset—\$1,260,164.91
- 5) Los Angeles County Treasurer and Tax Collector—\$1,653,568.21
- 6) Los Angeles County Treasurer and Tax Collector—\$246,421.96

Cash collateral will be used to fund payroll and payroll taxes, expenses for maintenance and utilities, and other operating expenses. The Debtor will make monthly adequate protection payments to secured creditor G450 LLC (“G450”) in the amount of \$50,000.

The Debtor’s current plan is to conduct an auction of the California Marketplace on or before July 4, 2020.

## **II. Findings and Conclusions**

Section 363(c)(2) requires court authorization for the use of cash collateral unless

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"each entity that has an interest in such cash collateral consents." In the Ninth Circuit, satisfaction of §363(c)(2)(A) requires the "affirmative express consent" of the secured creditor; "implied consent," resulting from the failure of the secured creditor to object to use of cash collateral, does not satisfy the requirements of the statute. *Freightliner Market Development Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 368–69 (9th Cir. 1987). Absent affirmative express consent, the Debtors "may not use" cash collateral absent the Court's determination that the use is "in accordance with the provisions" of Section 363—that is, that the secured creditor's interest in the cash collateral is adequately protected. § 363(c)(2)(B) and (e).

A secured creditor's interest is adequately protected if the value of its collateral is not declining; the secured creditor is not entitled to payment to compensate for its inability to foreclose upon the collateral during bankruptcy proceedings. *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988).

The Debtors filed the updated Cash Collateral Budget [Doc. No. 95] (the "Budget") on March 19, 2020. On that same date, the City of Los Angeles ("Los Angeles") issued that certain *Public Order Under City of Los Angeles Emergency Authority* (the "Safer at Home Order"). As relevant to the instant Motion, the Safer at Home Order requires all residents of Los Angeles to remain at home, except to engage in "essential activities," including "obtaining grocery items." Safer at Home Order ¶ 5(ii). Under the Safer at Home Order, only businesses providing services "critical to the health and well-being of the City" may remain open. *Id.* at ¶ 5(vii)(a). Businesses that may remain open include "[g]rocery stores, ... convenience stores, and other establishments engaged in the retail sale of canned food, dry goods, fresh fruits and vegetables, pet supply, fresh or frozen meats, fish, and poultry, and any other household consumer products ...." *Id.*

The Debtor's monthly cash receipts consist solely of rental payments received from tenants at the California Marketplace. The effect of the Safer at Home Order upon the Debtor's cash flow, if any, is not reflected in the Budget, which was prepared before the Safer at Home Order took effect.

Tenants at the California Marketplace owe the Debtor monthly rental payments in the aggregate amount of \$289,385. The majority of these payments come from the Debtor's largest tenant, the Gaju Market Corp. (the "Gaju Market"), which pays monthly rent of \$173,952. The Court takes judicial notice of the fact that the Gaju Market is a grocery store that remains open for business.

In connection with prior cash collateral hearings, the Court has found that the

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California Marketplace was not declining in value. The Court finds it appropriate to maintain that finding until presented with concrete evidence to the contrary. The Court notes that the instant bankruptcy petition was precipitated by litigation with Belmont and Admire, not by operating losses. The Debtor's largest tenant is a grocery store whose cash flows are more resilient to the effects of the Covid-19 pandemic than those of other retail establishments. It is also worth emphasizing that the value of the California Marketplace is not likely to decline as a result of short-term liquidity issues that tenants may experience as a result of the pandemic. The California Marketplace is situated in a desirable location and has historically been profitable. Any effects of the pandemic upon profitability will most likely be temporary.

Based on the absence of evidence of declining value and the proposed adequate protection payments to G450, the Court finds that secured creditors with an interest in the Debtor's cash collateral are adequately protected. In addition, the use of cash collateral to maintain the California Marketplace's operations constitutes further adequate protection. *See In re Megan-Racine Associates, Inc.*, 202 B.R. 660, 663 (Bankr. S.D.N.Y. 1996) (concluding that "[a]s long as there was a continuous income stream being generated by the Debtor, the fact that the Debtor consumed a portion of those monies to operate and maintain the facility each month did not diminish the value of the [secured creditor's] interest in the [cash collateral]").

The Debtor is authorized to use cash collateral in accordance with the Budget through and including July 4, 2020. A hearing on the use of cash collateral subsequent to July 4, 2020 shall take place on **July 1, 2020, at 10:00 a.m.** The hearing will go off calendar if the Debtor has sold its assets prior to the hearing date. The Debtor shall submit further evidence in support of the continued use of cash collateral, including an updated Budget, by no later than **June 10, 2020**. By that same date, the Debtor shall provide notice of the continued hearing and shall file a proof of service so indicating. Opposition to the continued use of cash collateral is due by **June 17, 2020**; the Debtors' reply to any opposition is due by **June 24, 2020**.

Within seven days of the hearing, the Debtor shall submit an order incorporating this tentative ruling by reference.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Carlos Nevarez or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will

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determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

<b>Party Information</b>
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**Debtor(s):**

450 S. Western, LLC, a California

Represented By  
Aram Ordubegian  
Christopher K.S. Wong  
M Douglas Flahaut

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**2:20-11367 C & F Foods, Inc**

**Chapter 7**

**#7.00** Hearing  
RE: [10] Motion for Abstention Under Section 305 C & F Foods, Inc.'s Notice of Motion and Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition

Docket 10

**Tentative Ruling:**

3/31/2020

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For the reasons set forth below, the Abstention Motion is GRANTED. Based upon the totality of the circumstances, the Court finds that abstaining from this petition will better serve the interests of C&F and all creditors. The case is DISMISSED.

**Pleadings Filed and Reviewed:**

- 1) C & F Foods, Inc.'s Notice of Motion and Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 10] (the "Abstention Motion")
- 2) Memorandum in Opposition to C & F Foods, Inc.'s Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 15] (the "Opposition")
- 3) Declaration of Michael Rogers in Opposition to C & F Foods, Inc.'s Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 16] (the "Rogers Decl.")
- 4) Declaration of Larry Kubo in Support of Claim of Tarke Bean, LLC [Doc. No. 17] (the "Kubo Decl.")
- 5) Declaration of Paulo Folster in Opposition to C & F Foods, Inc.'s Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc.

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**C & F Foods, Inc**

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No. 18] (the "Folster Decl.")

- 6) C & F Foods, Inc.'s Reply in Support of Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 27] (the "Reply")
- 7) Supplemental Declaration of Luis Faura in Support of Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 28] ("Faura Supp. Decl.")
- 8) Supplemental Declaration of James K. Baer in Support of Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 29] ("Baer Supp. Decl.")
- 9) Secured Creditor Bank of the West's Statement of Position Re Alleged Debtor C&F Food, Inc.'s Motion for Order Abstaining from Chapter 7 Case and Dismissing Involuntary Petition [Doc. No. 26] (the "Lender's Statement")

**I. Facts and Summary of Pleadings**

On February 7, 2020, Hinrichs Trading, LLC ("Hinrichs"), Rhodes-Stockton Bean Co-op ("Rhodes-Stockton"), and Tarke Bean, LLC ("Tarke") (collectively, the "Petitioners") filed an involuntary chapter 7 petition against C & F Foods, Inc ("C&F"). The Petitioners each assert to be qualified petitioners under 11 U.S.C. § 303 as (1) Hinrichs holds a claim of \$699,760, (2) Rhodes-Stockton holds a claim of \$73,240, and (3) Tarke holds a claim of \$149,600. *See* Petition at 3 [Doc. No. 1]. C&F was served with the *Summons and Notice of Status Conference in Involuntary Bankruptcy Case* on February 19, 2020 [Doc. No. 6]. C&F opposes the instant case by way of a timely filed motion of abstention and dismissal of the instant bankruptcy proceeding [Doc. No. 10] (the "Abstention Motion").

**A. Background**

To provide context for the conclusions set forth herein, the Court describes the history of events leading up to this case in detail.

**Events Leading to Financial Distress**

C&F is a closely-held California corporation, which was formerly in the business of producing, packing, distributing, and supplying dried food products to numerous food-manufacturing businesses in the United States and worldwide. C&F's financial difficulties were precipitated by the company's troubled migration to a new "enterprise resource planning" platform (the "ERP Software") in 2017, which was plagued by three failed launches and the corruption of the software's source code. Declaration of Luis Faura (the "Faura Decl."), ¶ 5. Arguably the most detrimental aspect of C&F's



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migration to the ERP Software resulted from systematic errors in the software's tracking and reporting of inventory. *Id.*, ¶ 6. Namely, the ERP Software grossly overstated the quantity of products in C&F's facilities. *Id.* In August 2019, a manual audit of C&F's products confirmed that the ERP Software had inflated inventory by millions of dollars in value. *Id.*, ¶ 6.

In December 2018, before this issue was discovered, C&F entered into a credit facility agreement with the Bank of the West (the "Lender"), granting C&F access to a revolving credit facility collateralized by a blanket security interest on all of C&F's assets. *Id.*, ¶ 7. Pursuant to the credit agreement, C&F's outstanding balance could not surpass a fixed borrowing base, which was computed through a formula that considered the company's accounts receivable, inventory, and accounts payable. *Id.* The ERP Software's systematic errors proved disastrous for C&F, which had relied upon the overstated inventory numbers in calculating monthly reports issued to the Lender. Following the inventory audit, C&F learned that its credit balance surpassed the permitted borrowing base by an eight-digit figure. *Id.*, ¶ 8. Shortly thereafter, to evaluate its options, C&F retained the services of KGI Advisors, Inc., a financial consultant, and CMBG Advisors, Inc. ("CMBG"), a restructuring consultant. *Id.*, ¶ 9. However, C&F claims that the Lender rejected its proposal to undertake a six-month turnaround to pay outstanding debts, triggering C&F's decision to sell all or substantially all of its assets. *Id.*, ¶ 10.

Starting in late 2019, C&F attempted to consummate the sale of its assets on at least four different occasions. In early November 2019, after conducting due diligence on C&F, a major trader of dried goods submitted an "unacceptably" low offer to purchase C&F's assets. Faura Decl., ¶ 11. In mid-November 2019, a private equity firm (the "PE Firm") stated an interest to purchase substantially all of C&F's assets, provided that the sales process included an assignment for the benefit of creditors ("ABC") arrangement to sustain business operations and prevent the devaluation of assets. *Id.*, ¶ 12. According to Luis Faura ("Faura"), C&F's President and CEO, the company preferred an ABC instead of chapter 11 bankruptcy due to the costs and delays attendant with the latter. *Id.* On December 31, 2019, faced with a liquidity shortage, Faura asserts that C&F had no option but to lay off all of its employees, pay out employees' benefits, and discontinue 401(k) plans. *Id.*, ¶ 14. However, upon the request of the PE Firm, which was still interested in purchasing assets, employees returned to work with Faura personally footing the bill for their wages. *See id.*, ¶¶ 1,

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14. Unfortunately, the PE Firm was unable to finalize the purchase agreement on three different occasions—on December 31, 2019, January 6, 2020, and finally on January 13, 2020. *Id.*, ¶ 13.

*C&F's ABC Agreement with CMBG*

On January 15, 2020, C&F entered into an agreement, governed under California law, to assign its interest in all of its assets to CMBG for the benefit of creditors (the "General Assignment"). Faura Decl., ¶ 16; Declaration of James K. Baer ("Baer Decl."), ¶ 3, Ex. 2. Pursuant to the General Assignment, C&F halted business operations and transferred all of its assets to CMBG's control. Faura Decl., ¶ 17. As further specified in the General Assignment, the deadline to submit proofs of claim in the ABC proceeding is June 28, 2020; and, as of March 10, 2020, CMBG states that over 100 proofs of claim have been received. *See* Baer Decl., ¶ 8. From January 27, 2020 to February 14, 2020, CMBG delivered the following materials to approximately 383 interested parties identified by C&F, consisting of creditors, shareholders, and other stakeholders: (1) a notice of the General Assignment and of the deadline to submit proofs of claim, (2) a proof of claim form, and (3) a copy of the General Assignment. *See id.*, ¶ 7. The General Assignment provides that CMBG may perform numerous services in furtherance of the assignment estate, including *inter alia*: the oversight of C&F's seven facilities, physical assets, and bank accounts; assessment of liquidity of assets; collection of accounts receivable; settlement of lawsuits and disputes; as well as resuming services previously provided in connection to C&F's restructuring efforts, such as marketing of assets and communicating with creditors about the sales process and the administration of the estate. *See id.*, ¶ 9 (enumerating a comprehensive list of CMBG's services). James K. Baer ("Baer"), president of CMBG, further states that CMBG professionals have provided approximately 2,350 work hours on such services, of which 315 hours constitute restructuring services rendered prior to the assignment, and 2,045 hours rendered after the assignment. *See id.*, ¶ 10.

Following the commencement of the ABC process, a new buyer (the "Proposed Buyer") expressed an interest in purchasing substantially all of C&F's assets (excepting accounts receivable and certain inventory). Baer Decl., ¶ 12. The Proposed Buyer, however, has not proceeded with the sales process due to the filing of this involuntary petition. Notwithstanding, Baer believes the asset sale will be completed, provided the case is dismissed. *See id.*, ¶ 11.

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**B. The Abstention Motion**

On March 11, 2020, C&F filed the Abstention Motion. C&F opposes the involuntary petition, arguing that (1) Tarke is ineligible to be a petitioning creditor, as mandated by the requirements set forth in § 303(b), as it holds a claim that is subject to a bona fide dispute, and (2) that the Court should abstain and dismiss this case because the interests of C&F and all creditors would be better served outside of bankruptcy. More specifically, because C&F has transferred all of its assets to CMBG's control and initiated the ABC process, the alleged debtor argues that the Court should follow California's long-standing policy of enforcing ABCs. C&F further asserts that relevant authority, as well as § 305(a)'s legislative history, calls for dismissal of an involuntary case, where—as it is the case here—there is a pending ABC proceeding. *See* Abstention Motion at 9-10 (citing, *inter alia*, *Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.)*, 370 B.R. 236, 246 (B.A.P. 9th Cir. 2007)). Relying upon *In re Macke*, C&F maintains that both C&F and its creditors would be better served by abstention and dismissal based upon the "totality of circumstances." According to the Abstention Motion, a totality of the circumstances inquiry is guided by the following non-exclusive factors:

1. the economy and efficiency of administration ("Factor No. 1");
2. whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court ("Factor No. 2");
3. whether federal proceedings are necessary to reach a just and equitable solution ("Factor No. 3");
4. whether there is an alternative means of achieving an equitable distribution of assets ("Factor No. 4");
5. whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case ("Factor No. 5");
6. whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process ("Factor No. 6"); and
7. the purpose for which bankruptcy jurisdiction has been sought ("Factor No. 7").

Abstention Motion at 10 (citing to *Marciano v. Fahs (In re Marciano)*, 459 B.R. 27, 46-47 (B.A.P. 9th Cir. 2011)) (internal citations omitted).

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In sum, and as discussed in greater detail below, C&F elaborates that these factors are either neutral or in favor of abstention and dismissal. Given that the interests of stakeholders would be better served outside of bankruptcy, C&F requests that the Court abstain from exercising jurisdiction and dismiss this case.

Alternatively, C&F claims that the Petitioners have failed to satisfy the § 305(b) qualifying creditor threshold as Tarke holds a claim subject to a bona fide dispute. C&F's position is that it has no record of ever entering into a transaction with Tarke over the past several years. *See* Faura Decl., ¶ 19. Moreover, the Petitioners have failed to substantiate Tarke's claims, despite C&F's prior request to provide supporting documentation. *See* Declaration of Dean G. Rallis, Jr. ("Rallis Decl."), ¶ 7. C&F surmises that Tarke received its claim just prior to the petition date, to enable Petitioners to satisfy the § 305(b) requirements. If this is actually the case, C&F concludes, then the Petitioners have either intentionally obscured Tarke's transferee status, or they have failed to comply with Fed. R. Bankr. P. 1003(a).

**C. The Opposition**

On March 18, 2020, the Petitioners timely filed a joint opposition (the "Opposition") contending that the totality of the circumstances supports denial of the Abstention Motion, urging the Court to assume jurisdiction over the case. The Petitioners assert that C&F failed to meet the high burden of dismissal under § 305(a) as established in *Eastman v. Eastman (In re Eastman)*, 188 B.R. 621, 624 (B.A.P. 9th Cir. 1995). The main thrust of the Petitioners' opposing arguments is that an ABC would inadequately ensure the fair treatment of unsecured creditors, and, comparatively, such proceeding would be prohibitively costly based on CMBG's compensation and Mr. Baer's expected fees and expenses. In support of the Opposition, the Petitioners attached the declaration of Paulo Folster ("Folster"), the CEO and co-founder of Fortuna Group Trade Corp. ("Fortuna"), a quinoa supplier and unsecured creditor of C&F. Declaration of Paulo Folster (the "Folster Decl."), ¶ 1. Folster states that C&F and Fortuna entered into a contract for the sale of goods over a six-month period. *See id.*, ¶ 2. He recounts that C&F failed to make payment for the initial delivery of goods, while pressuring Fortuna to continue with deliveries. *See id.* Folster claims that C&F intended to defraud creditors based on the company's unfulfilled promises and Folster's communications with other unsecured creditors, who share similar accounts of C&F's behavior. Based on C&F's prior treatment of

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unsecured creditors, the Petitioners are concerned that C&F concealed away assets and that the ABC will instead offer preferential treatment to the Lender.

Finally, with respect to Tarke's contested status, the Petitioners counter that Tarke's claim is substantiated by invoices attached to the declaration of Larry Kubo ("Kubo"), Tarke's general manager. Kubo declares that between June 14, 2019 and August 5, 2019, Tarke delivered five separate shipments to C&F pursuant to a sale of goods contract, for which no payment was ever received. Declaration of Larry Kubo ("Kubo Decl."), ¶ 6. The Opposition presupposes that, in light of the technical issues occasioned by the ERP Software, it is likely that the Tarke transactions were not properly accounted for by C&F. However, if the Court is inclined to find that Tarke is not a qualifying creditor, the Petitioners assert they can join another petitioning creditor to satisfy § 305(b).

**D. The Reply**

On March 25, 2020, C&F filed a timely reply arguing that the Petitioners' Opposition neglects to justify the purported benefits of a bankruptcy proceeding over the pending ABC, which will maximize the value of C&F's assets, optimize distributions to creditors, and preserve the substantial amount of work already incurred. C&F further responds to the Opposition's points concerning each of the seven non-exclusive factors highlighted in *In re Macke*.

As to Factor No. 1, C&F counters that the economy and administration support the continuation of the ABC as CMBG's financial incentives parallel the interests of unsecured creditors. Accordingly, CMBG will not receive any compensation until the Lender "is paid in full," and only once Lender releases its lien over C&F's property, will it be entitled to receive a 5% commission of any recovered assets distributed for the benefit of unsecured or junior secured creditors. *See* Baer Supp. Decl., ¶ 9. Relatedly, as to Factor No. 5, C&F asserts that the ABC will offer all creditors the best opportunity to maximize recovery. With respect to Factor No. 2, C&F reiterates that the ABC is an acceptable nonbankruptcy proceeding. With respect to Factor No. 3—regarding the necessity of a federal proceeding, C&F argues that the powers available to CMBG, as assignee, mirror a chapter 7 trustee's ability to avoid and recover preferential payments for the benefit of unsecured creditors. Otherwise, C&F notes that the Opposition fails to establish any grounds to suspect CMBG's integrity in overseeing the assignment estate. With respect to Factor No. 4—regarding the

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possibility of achieving equitable distribution, C&F again points out that the Petitioners' misgivings surrounding the ABC process are baseless. Furthermore, as to Factor No. 6, based on the substantial progress already made, duplicating CMBG's efforts in a chapter 7 liquidation would result in a waste of time and limited resources. Finally, as discussed in regard to Factor No. 3, the Petitioners have failed to justify their grounds for remaining in a bankruptcy forum. In sum, C&F submits that the totality of circumstances support abstention and dismissal of this case.

In support of the Reply, C&F provided Faura's supplemental declaration, which responds to the status of Tarke's claim. Having again reviewed C&F's billing records, Faura asserts that Tarke's claim is based upon goods C&F ordered directly from Rhodes-Stockton, not Tarke. *See* Faura Supp. Decl., ¶¶ 5-9. Faura also points out that these purchase orders identify Rhodes-Stockton as the vendor, while designating Tarke's address as the location where shipments would be picked up C&F. The Reply argues that because Rhodes-Stockton and Tarke share the same address, Tarke is either an affiliate entity or a transferee of Rhodes-Stockton's claim. C&F concludes that Tarke cannot be a qualifying petitioner, and even if the Petitioners could find a qualifying creditor, joinder should be precluded as this petition was filed in bad faith.

**E. The Lender's Statement**

On March 25, 2020, the Lender presented a statement in support of the Abstention Motion, making the following salient points:

- Lender is C&F's largest secured and unsecured creditor, with a claim in excess of \$27 million.
- Based on offers received to purchase C&F's assets, Lender believes that the realizable value of C&F's assets is less than \$15 million.
- The Petitioners' assertion that the Lender will receive preferential treatment through the ABC is unsupported as such treatment would violate applicable California law.

In short, Lender supports the Abstention Motion, but stands ready to cooperate in a bankruptcy proceeding were the Court to deny the motion.

**II. Findings and Conclusions**

Section 303(b), which governs the commencement of an involuntary petition, provides in relevant part:



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An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount...if such noncontingent, undisputed claims aggregate at least \$16,750 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims.

Section 303(h) provides that if "the petition is not timely controverted; the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed."

**A. Based upon the Totality of the Circumstances, Abstention and Dismissal Serves the Best Interests of C&F and Its Creditors**

Notwithstanding a court's jurisdiction over involuntary cases pursuant to § 303, § 305 permits bankruptcy courts to decline such jurisdiction and dismiss involuntary cases. *In re Eastman*, 188 B.R. at 624 (finding that an involuntary chapter 7 proceeding could be dismissed under either §§ 707(a) or 305(a)) (internal citations omitted); D. Epstein, S. Nickles & J. White, *Bankruptcy* § 2-5g (1992) ("[A]n involuntary petition that satisfies all of the requirements of section 303 can be dismissed under section 305...."). More specifically, a bankruptcy court may dismiss an involuntary case, after notice and a hearing, if it makes the determination that "the interests of creditors and the debtor would be better served by such dismissal." § 305(a)(1).

Here, C&F seeks that the Court refrain from exercising jurisdiction over the involuntary case and enter an order of dismissal pursuant to § 305(a)(1). Grounds for dismissal under § 305(a)(1) includes whether there is an outstanding, non-bankruptcy proceeding such as an assignment for the benefit of creditors. *See e.g., In re Macke*, 370 B.R. at 247 (assignment for benefit of creditors); *In re Bailey's Beauticians Supply Co.*, 671 F.2d 1063 (7th Cir.1982) (state court receivership); *In re Bioline Labs.*, 9 B.R. 1013 (Bankr. E.D.N.Y. 1981) (bulk sale agreements); *In re Sun World Broadcasters*, 5 B.R. 719 (Bankr. M.D. Fla. 1980) (SEC equity receivership). Further, the legislative history of § 305(a) specifically addresses one acceptable ground for dismissal:

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The court may dismiss or suspend under the first paragraph, for example, if an arrangement is being worked out by creditors and the debtor out of court, there is no prejudice to the rights of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment.

H.R. Rep. No. 95-595 at 325 (1977); S. Rep. No. 95-989, at 35-36 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6281-82, 5787, 5820-22. Courts assess whether abstention or dismissal best promotes the interests of the debtor and creditors by considering the "totality of the circumstances." *In re Eastman*, 188 B.R. at 624. Before a court determines not to exercise jurisdiction over an involuntary case, "it must make specific and substantiated findings that the interests of the creditors and the debtor will be better served by dismissal or suspension." *In re Macke*, 370 B.R. at 247 (internal citation omitted). In the Ninth Circuit, this inquiry is generally informed by consideration of seven factors. *See In re Marciano*, 446 B.R. 407, 423 (Bankr. C.D. Cal. 2010), *aff'd*, 459 B.R. 27 (B.A.P. 9th Cir. 2011), *aff'd*, 708 F.3d 1123 (9th Cir. 2013); *see also In re Morabito*, No. BAP NV-14-1593-FBD, 2016 WL 3267406 (B.A.P. 9th Cir. June 6, 2016). The *Marciano* factors are outlined above and apply to the present facts as follows.

***1. Economy & Efficiency of Administration***

Factor 1 assesses whether exercising jurisdiction over an involuntary case would (a) increase costs—the economy of administration—or (b) delay the orderly and timely distribution of a debtor's assets—the efficiency of administration. *See In re Marciano*, 446 B.R. at 433 (finding that Factor 1 weighed against suspension where an involuntary debtor failed to justify why a pendant appellate proceeding would delay his involuntary chapter 11).

C&F argues that Factor 1 militates in favor of dismissal on account of the pendency of the ABC proceeding, where CMBG has already provided over 2000 hours in services over the course of several weeks, and become well acquainted with C&F's assets and finances. *See Abstention Motion* at 11. The Petitioners respond that the ABC will be more costly than a chapter 7 proceeding on account of CMBG's compensation model and Mr. Baer's anticipated fees. Although Petitioners cannot say



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whether the ABC will delay the estate's administration, they surmise that CMBG lacks the necessary know-how, as well as the power vested in chapter 7 trustees, to adeptly oversee C&F's production plants and business offices located in at least six states. Opposition at 3.

On balance, the Court finds that Factor 1 weighs in favor of abstention because maintaining this matter in chapter 7 would result in a significant duplication of efforts, thereby increasing expenses on C&F's estate. Here, the assignment estate was created over three months ago, over which time CMBG has dedicated thousands of work hours to finalize C&F's business accounts, assume control of assets, settle disputes, and find a suitable buyer. Having been retained as its restructuring consultant last fall, CMBG has demonstrated ample understanding of C&F's personal property, accounts, and critical financial relationships through the progress it has already achieved in the ABC proceeding. Notably, CMBG has informed approximately 383 interested parties of the ABC, received over 100 proofs of claim, and collected nearly \$3,000,000 in accounts receivable due and owing. If the Court were inclined to retain jurisdiction, a bankruptcy trustee would have to replicate this work to varying lengths. Moreover, the ability of CMBG to competently administer C&F's estate is well supported by the strong credentials of its managing member and by its familiarity of the matter [Note 1]. The Court is cognizant of the significant effort and expense required to administer a case of this size and complexity, but it does not find that the Petitioners' speculation is justified. The Petitioners offer no facts whatsoever challenging CMBG's expertise; as such, their unsupported conjecture is not convincing. Furthermore, to the extent that C&F has engaged in the conduct purported by Folster, CMBG has both the contractual authority and incentive to utilize California law to recover property benefitting unsecured creditors. *See In re Brun*, 360 B.R. 669, 671-72 (Bankr. C.D. Cal. 2007) ("Under California law, an unsecured creditor may avoid a fraudulent 'transfer' to the extent necessary to satisfy the creditor's claim."); *see also* California Civil Code § 3439.07(d) (authorizing assignee in an ABC proceeding to exercise any rights and remedies available to creditors under the statute). In sum, the Petitioners have not presented a legitimate reason to find that CMBG will be incapable of efficiently managing the ABC proceeding.

Further, the Petitioners make much of CMBG's compensation structure; however, these contentions are again supported by little more than the skepticism cited by Michael Rogers ("Rogers"), the Petitioners' counsel. Baer clarifies that he explained to

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Rogers that CMBG would only be entitled to a 5% commission from the value of assets recovered for the benefit of unsecured creditors, which Baer assures does not include a percentage from any sale proceeds received from the Proposed Buyer. Moreover, Rogers admits that he does not know what Baer's hourly rate is, but merely suspects that "a bankruptcy trustee sounds much cheaper." Rogers Supp. Dec., ¶ 3. Conversely, C&F has established that much work has already been performed through the ABC proceeding, and a chapter 7 trustee will be required to duplicate the services since provided by CMBG, and seek to employ various other professionals—all to be paid from the estate.

The Court finds that C&F's estate will be economically and efficiently administered in the ABC; and therefore, Factor 1 strongly weighs in favor of dismissal.

***2. Alternate Forum to Protect Interests of Debtor and Creditor***

ABCs are commonly used in California and recognized as a viable alternative to formal liquidation proceedings in bankruptcy court. *See Sherwood Partners, Inc. v. EOP-Marina Bus. Ctr., L.L.C.*, 153 Cal. App. 4th 977, 981 (2007); *see also* 1 Witkin, Summary 11th Contracts § 730 (2019). The Petitioners claim that a state court proceeding must be commenced to ensure the fair treatment of unsecured creditors in the ABC. As explained above, the Petitioners have not articulated any reason to believe that the ABC proceeding is compromised. In short, the Court agrees with C&F that the pending ABC is an available forum to protect the interests of both C&F and the creditors. Having reviewed CMBG's qualifications, the Court finds no reason to doubt that CMBG will competently oversee the ABC process. This factor supports dismissal of this case.

***3. Whether Federal Proceedings are Necessary to Reach an Equitable Outcome***

With respect to Factor 3, the Petitioners maintain that C&F's liquidation requires the "transparency and safeguards" found in federal bankruptcy court to ensure the fair treatment of creditors. The Court reiterates that the Petitioners have not proffered any evidence to cast doubt on the integrity of the ABC process. Even though the Petitioners have not supplied any convincing proof of fraudulent conduct purportedly undertaken by C&F, CMBG has the contractual authority and the duty to marshal and

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liquidate the alleged debtor's assets through the filing of preferential or fraudulent transfer actions. *See Sherwood Partners, Inc.*, 153 Cal. App. 4th at 983. Factor 3 weighs in C&F's favor.

***4. Alternative Means of Achieving an Equitable Distribution***

Based on the explanations provided above, the Court finds that the ABC proceeding constitutes an alternative means of achieving an equitable distribution. This factor also supports dismissal of this case.

***5. Likelihood that Parties can Achieve a Less-Expensive Out-of-Court Settlement***

Relevant to Factor 5 is the consideration of facts that have either not been fully developed or presented to the Court. Based on the record presented, it appears that the pending ABC has required little to no state court intervention, and whether the parties can amicably resolve disputes remains to be seen. The Court notes that CMBG has been in contact with unsecured creditors and is working on organizing an unsecured creditor committee. *See* Baer Supp. Decl., ¶ 11. The Court is hopeful that such steps will facilitate an inexpensive and speedy resolution, but as it stands, it cannot determine whether this factor supports abstention and dismissal.

***6. Whether the Non-Federal Process has Proceeded so Far that the Bankruptcy Process Would be Costly and Time Consuming***

The Court determines that Factor 6 weighs in favor dismissal, given that much of the discussion pertaining to Factor 6 directly ties to the Factor 1 analysis. Further, the Petitioners' suggestion that C&F purposefully waited until March 11 to file the Abstention Motion to overstate activity in the ABC is another contrived argument. As mentioned above, the ABC process began on January 15, 2020, and in the interim, CMBG has performed a detailed list of services that includes arranging for the sale of substantially all of C&F's assets to the Proposed Buyer. *See* Baer Decl., ¶¶ 9, 10, 12; Baer Supp. Decl., ¶¶ 6-12. At this stage, a chapter 7 proceeding could permanently undo all of CMBG's efforts. Factor 6 strongly supports the dismissal of the case.

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***7. Purpose for Which Bankruptcy Jurisdiction Has Been Invoked***

According to the Petitioners, Factor 7 weighs in favor of remaining in this forum due to the procedural safeguards expected in bankruptcy court. To the extent that the Petitioners' only supporting points are derivative of prior arguments, the Court similarly finds that Factor 7 is decisively in favor of dismissal.

In summary, the Court determines that six of the seven *Marciano* factors support dismissal, and Factor 5 is neutral to either side's position. Based upon the foregoing assessment, the interests of C&F and all creditors will be better served by the dismissal of this case. This conclusion is also consistent with the Court's general observations that the ABC process grants creditors with a forum for the orderly administration of the assignment estate, and with the most expeditious avenue to liquidate the assets. As an assignee of the ABC, CMBG's role is analogous to that of a chapter 7 trustee, and it has both the incentive and the contractual authority to maximize the unsecured creditors' recovery. Were the Court to exercise jurisdiction over this matter, the contributions already made by CMBG would either be duplicated or permanently negated, thereby accruing unnecessary administrative expense to all interested parties. For the reasons set forth above, the best interest of all parties calls for the Court's abstention, and for the dismissal of this involuntary petition.

Having determined that the dismissal of the involuntary petition is warranted under § 305, the Court need not address § 303 arguments.

**III. Conclusion**

Based on the foregoing, the C&F's Abstention Motion is GRANTED. The Court determines that abstaining from this petition will better serve the interests of C&F and all creditors. The case is DISMISSED.

C&F is directed to lodge a conforming proposed order, incorporating this tentative ruling by reference, within seven days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Carlos Nevarez or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.**

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Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

**Note 1:** Mr. Baer has been a corporate attorney for the last 30 years, specializing in corporate restructuring work over the last decade. *See* Abstention Motion, Ex. 5. His curriculum vitae indicates that he has recently performed assignee services in at least ten different matters. *See id.*

<b>Party Information</b>
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**Debtor(s):**

C & F Foods, Inc

Represented By  
Dean G Rallis Jr

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**#8.00 Status Hearing**

RE: [1] Chapter 7 Involuntary Petition Against a Non-Individual - Inc. - :  
Hinrichs Trading, L.L.C. (attorney Michael Rogers), Rhodes-Stockton Bean Co-  
Op (attorney Michael Rogers), Tarke Bean, LLC (attorney Michael Rogers) .

fr. 3-31-20

Docket 1

**Tentative Ruling:**

3/31/2020

See Cal. No. 7, incorporated in full by reference.

<b>Party Information</b>
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**Debtor(s):**

C & F Foods, Inc

Pro Se